SYNOPSIS OF CRIMINAL OPINIONS IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI HANDED DOWN MAY 11, 2010

Johnson v. State, No. 2008-KA-00537-COA (Miss.App. May 11, 2010)

CRIME: Aggravated Assault
SENTENCE: 20 years

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Tomie Green

APPELLANT ATTORNEY: Donald W. Boykin
APPELLEE ATTORNEY: Deirdre McCrory
DISTRICT ATTORNEY: Robert Shuler Smith

DISPOSITION: Affirmed. Irving, J., for the Court: King, C.J., Lee and Myers, P.JJ., Griffis, Ishee, Roberts and Maxwell, JJ., Concur. Barnes, J., Concurs in Part and in the Result.

ISSUES: (1) that he was denied his right to a speedy trial, (2) that the trial court erred in allowing certain hearsay testimony, (3) that the trial judge exhibited bias, (4) that the trial court erred in refusing to grant his for-cause challenge, and (5) that the trial court erred in granting one of the State's jury instructions.

FACTS: On February 28, 2006, Jeremy Boyd was shot four times at his home in Jackson, MS. Boyd, an acquaintance of Virgil N. Johnson, identified Johnson as the perpetrator. Boyd stated he invited Johnson over to his house because he had planned to purchase a vehicle and wanted Johnson's assistance. Boyd gave Johnson a haircut and the two played video games and smoked marijuana. Boyd testified that Johnson then became quiet, but stated he was all right. Boyd continued to play. He recalled that his gun was on the floor near his feet and that "out of the corner of [his] eye" he saw Johnson get up. Boyd said that he assumed Johnson was going to the bathroom but that Johnson came up behind him and shot him in the back of his neck with Boyd's own gun. Johnson immediately shot him again. Johnson shot him two additional times as he was playing dead. Johnson flipped him over and started rifling through his pockets. Boyd testified that Johnson took $1,900 that he had in his pocket—money that he had planned to use to purchase the vehicle. Boyd stated that Johnson then fled the scene. Boyd used his cellular telephone to call for help.

HELD: Johnson made a demand for a speedy trial 12 days before he was arraigned. He was arraigned on April 16, 2007, and went to trial on March 11, 2008. Testimony during the hearing indicated Johnson had three trial settings. Although no continuances were in the record, the trial judge cited a backlog of cases which caused his trial to be delayed. "Section 99-17-1 does not specifically require that any continuance that is granted by the court be in the form of a written order, only that the continuance be 'duly granted by the court.'" The COA did not condone this practice, but found no statutory violation. Johnson suffered no prejudice to his defense.

==>Johnson was not denied his constitutional right to a speedy trial despite a 680 day between arrest

and trial. "Even though Johnson was presumptively prejudiced because of the length of the delay, the clear evidence is that he was not actually prejudiced. While Johnson argued that he was prejudiced in several ways, none dealt with an impairment to his ability to vigorously defend against the charges."

==>The trial judge did not err in allowing police officers to testify Boyd told them Johnson shot him, both at the scene and at the hospital. Boyd had already testified to this. Any error was harmless.

==>The trial judge did not exhibit bias by explaining to the officer how he could testify without giving hearsay. The court stated, "Just tell what you learned as result of your investigation." This was not an improper interjection into the trial.

==>The trial judge did not err in refusing challenges for cause against two jurors who admitted, in response to defense questioning, that they wondered what the defendant did when they walked into the courtroom. The court found just wondering what the defendant did was not a reason to strike without more. There was nothing to indicate the jurors could not be fair. The defense used peremptory challenges on the jurors and did not raise a claim as to the loss of the peremptories.

==>The trial judge did not err in allowing an identification instruction. Although objected to, both the defense and prosecution worked together on the language to make it acceptable to both sides. When it was offered again, the defense failed to object.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62780.pdf

McCrory v. State, No. 2009-KA-00290-COA (Miss.App. May 11, 2010)

CRIME: 2 Counts Sexual Battery
SENTENCE: Concurrent terms of 35 years with 30 to serve and 5 years PRS on each count

COURT: Rankin County Circuit Court
TRIAL JUDGE: Hon. William Chapman, III

APPELLANT ATTORNEY: M. Judith Barnett
APPELLEE ATTORNEY: John R. Henry, Jr.
DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Affirmed. Myers, P.J., for the Court: King, C.J., Lee, P.J., Griffis, Barnes, Ishee, Roberts and Maxwell, JJ., Concur. Irving, J., Concurs in Result Only.

ISSUES: (1) sufficiency of the evidence as to venue, (2) the child's failure to identify the defendant at trial, (3) expert testimony regarding the credibility of the child victims, (4) improper hearsay testimony, and (5) admission of tender years exception hearsay.

FACTS: Tommy Junior McCrory was indicted in May of 2007 on two counts of sexual battery. The

indictment alleged that between November 18, 2005, and January 8, 2007, McCrory had digitally penetrated his male stepchildren A.B. and BB, (ages 11 and 8 respectfully, at the time of the indictment). The allegations came to light in November 2006, when A.B. visited with his father, Robert Brown. Brown testified that A.B.'s mother had asked him to speak with A.B. regarding problems at home and at school. Brown took A.B. to a Wendy's, where he expected to discuss A.B.'s continuing bowel incontinence. When Brown questioned A.B. about his "problems," the child instead volunteered that he had been abused. A.B. stated that McCrory, who had recently married his mother, would "check his oil" by holding A.B. down and forcing a finger into his rectum. A.B. stated that McCrory had done this to him many times. A.B. also stated he had previously revealed the abuse to his mother and maternal grandmother, but his grandmother had dismissed it as a "joke," and his mother had told him that she needed McCrory's income to pay the bills. After an emergency hearing in Youth Court, A.B. and B.B. were placed in Brown's custody. B.B., although born during the marriage, was not Brown's natural child. Some time after being placed in Brown's custody, B.B. told Brown that he had also been molested by McCrory. B.B.'s description of the abuse was similar to that offered by A.B.

HELD: McCrory argues that B.B. was never asked on direct examination where the assaults took place. B.B. never explicitly stated that the acts occurred in Rankin County, but this fact was established by other evidence. Testimony from various witnesses at trial unanimously indicated that the grandmother's home was located in Richland, and that B.B.'s mother and McCrory lived first in an apartment and then in a house located in Pearl. Both were in Rankin County. The testimony was sufficient to establish venue by circumstantial evidence.

==>Although B.B. did not identify the defendant at trial, he did testify that he had been abused by "Tommy," who had been married to B.B.'s mother and was the father of B.B.'s two-year-old half-brother. At the time of trial, B.B. had not seen "Tommy" for more than a year. Another witness noted that McCrory had altered his appearance prior to the trial by changing his "hair style." McCrory was sufficiently identified as the individual who had assaulted B.B.

==> The State's expert did not testify as to the veracity of the victims. Brian Ervin, a forensic interviewer with the Children's Advocacy Center in Brandon, testified he conducted forensic interviews of the children approximately two months after the allegations of abuse came to light. Ervin never testified as to the veracity of either of the victims' statements. Ervin only detailed certain observations that in his opinion "added credibility" to each boy's account. The claim is barred for failing to object and is without merit.

==>The trial judge did not err in allowing an officer to give hearsay testimony to explain why the victims did not admit to the abuse during their first CAC interview. The officer told about an exchange with the victims' mother that, in his opinion, caused the kids not to talk to keep their mother out of trouble. Any error in admitting this testimony was harmless. The substance of the statement – that the victims' mother had told the children not to disclose the abuse because she feared the loss of McCrory's income – was also established through A.B.'s direct testimony and through Brown's testimony as admissible hearsay.

==>The trial court did not err in admitting the hearsay testimony offered by Brown under the tender

years exception of MRE Rule 803(25). At the time of the disclosures, both victims were under the age of 12. McCrory argues that the trial court erred in concluding that the victims' statements possessed substantial indicia of reliability, given that Brown was the only one present at the initial disclosures of the children, and they only told the CAC expert about the abuse after being with Brown for about 6 weeks. There was no abuse of discretion in the trial court's ruling.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62736.pdf

Gray v. State, No. 2009-CP-00986-COA (May 11, 2010)

CRIME: PCR – Armed Robbery
SENTENCE: 25 years w/o parole as an habitual offender

COURT: Simpson County Circuit Court
TRIAL JUDGE: Hon. Robert Evans

APPELLANT ATTORNEY: Robert L. Gray (Pro Se)
APPELLEE ATTORNEY: Madonna C. Holland
DISTRICT ATTORNEY: Eddie H. Bowen

DISPOSITION: Denial of PCR Affirmed. Lee, P.J., for the Court: King, C.J., Myers, P.J., Griffis, Barnes, Ishee, Roberts and Maxwell, JJ., Concur. Irving, J., Concurs in Result Only.

ISSUES: (1) the trial court erred in denying his motion for recusal; (2) the trial court erred in denying his PCR as newly discovered evidence was available; (3) his guilty plea was involuntary; (4) his trial counsel was ineffective; and (5) the prior convictions supporting his habitual offender status are incorrect.

FACTS: Robert L. Gray pled guilty in 1995 to armed robbery. He had two prior convictions for forgery from 1988 and 1990. He filed a PCR in April of 2007

HELD: Gray argued that the trial judge should have to recuse himself because he was the DA at the time Gray pled guilty in 1988 to forgery. The fact that Judge Evans prosecuted Gray in 1988, without more, does not overcome the presumption of impartiality or require recusal.

==> Gray claimed he had newly discovered evidence regarding his 1988 forgery. During his plea, the State said they had three witnesses to prove the crime, including the victim. Gray produced an affidavit from the victim stating he was never contacted by the State. The victim never said the crime did not occur. The affidavit was irrelevant.

==> Gray claimed his plea was involuntary because his 1988 forgery plea was invalid. His claim is without merit, as a prisoner cannot attack two judgments in one motion for post-conviction relief.

==>Gray was not denied effective assistance of counsel. Gray asserts that his trial counsel should

have investigated the prior convictions used for habitual offender status. However, the prior convictions were sufficient to meet the requirements of §99-19-81.

==>As previously discussed, Gray was properly found to be an habitual offender. He had two prior, separate convictions for which he was sentenced to terms of one year or more in a state and/or federal penal institution.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62737.pdf